

STATE OF MICHIGAN
IN THE SUPREME COURT
(ON APPEAL FROM THE COURT OF APPEALS)

KEVIN MACLACHLAN, as Personal
Representative of the Estate of DAVID
MACLACHLAN, Deceased,

Plaintiff-Appellee,

v

S. Ct. No. 128131
C.A. No. 252221
L.C. No. 02-1949-NI

CITY OF LANSING,
a municipal corporation,

Defendant-Appellant,

and

CAPITAL AREA TRANSPORTATION
AUTHORITY (CATA) and
JOHN DOE, an employee of CATA,

Defendants.

*128131
reply*

CITY OF LANSING'S REPLY BRIEF TO
PLAINTIFF/APPELLEE'S RESPONSE TO THE
CITY OF LANSING'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF THE QUESTION PRESENTED

**THE COURT OF APPEALS SUMMARILY
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691.1402(1). IS THIS COURT’S REVIEW
WARRANTED IN LIGHT OF THE COURT OF
APPEALS’ IMPROPER AND UNWARRANTED
EXPANSION OF THE SCOPE OF THE CITY’S
HIGHWAY LIABILITY?**

Defendant-Appellant City of Lansing says “YES”.

Plaintiff-Appellee says “NO”.

STATEMENT OF FACTS

MacLachlan includes with his response brief in opposition to the City of Lansing's application for leave to appeal (response brief) certain photographs which are said to represent the accident site. MacLachlan proposes that the photographs, which comprise Ex. 2 to his response brief demonstrate that, in plowing Pennsylvania Avenue, the City of Lansing created a wall of snow "in the roadway". While MacLachlan selected photographs which focus principally on the depth of the snow, the photographs likewise shed light on points which the City of Lansing urges in support of its requested relief.

The first is that the snow wall of which MacLachlan complains is an off-the-road condition. Moreover, as can be seen in the first photograph in Ex. 2, the wall of snow was a transitory condition. It was beginning to melt. It was not a highway defect. It was not any impediment to vehicular travel.

Second, the photographs attached to MacLachlan's brief disclose the efficacy of the City's efforts to clear Pennsylvania Avenue of snow. The road appears to be nearly dry.

Finally, the photographs substantiate another of the City of Lansing's arguments. That is that the increased hazard exception is not applicable to this case. Nothing about the snow conditions presented in the photographs included with MacLachlan's response brief manifest a condition which would not ordinarily be found in Michigan in mid-Winter. Michigan residents would never and could never claim to be unfamiliar with the conditions shown in the photographs submitted by MacLachlan.

ARGUMENT

PLAINTIFF LACKS A COGNIZABLE CLAIM UNDER MCL 691.1402(1).

The City of Lansing's position is solidly grounded upon the *Nawrocki v Macomb County Road Comm'n*, 463 Mich 143 (2000) decision. The City has repeatedly expressed its reliance upon *Nawrocki* in making the point that the transitory pile of snow involved in this case simply does not constitute a highway defect. MacLachlan disagrees. [Response Brief, p. 2 "The snow and ice was piled so high that it amounted to a defect on the improved portion of the highway." and p. 7 "The wall of snow and ice was a defect on the improved portion of the roadway, making travel unsafe for both vehicular and pedestrian traffic."]. Curiously, MacLachlan advances these claims notwithstanding his acknowledgement of the *Nawrocki* holding. At pages 6-7 of his response brief, MacLachlan agrees that:

Nawrocki held that with respect to the location of the alleged dangerous or defective condition, if the condition is not located in the actual roadbed designed for vehicular travel, the narrowly drawn highway exception is inapplicable and liability does not attach. (Response Brief, pp. 6-7).

Applying the *Nawrocki* holding here, it is apparent that MacLachlan's position is fatally defective on at least two grounds: First, the alleged defective condition involved here, an off-the-road pile of snow that would eventually melt away, was not an actual dangerous or defective condition of Pennsylvania Road under MCL 691.1402(1). It was

not located on the actual roadbed. And it does not present a breach of the City's duty to repair and maintain Pennsylvania Avenue.

Second, even if the Court is willing to treat the pile of snow as a defect or dangerous condition, it was not a defect of Pennsylvania Avenue, itself. The purpose of the City's engaging in snow-removal activities was to take the snow off the road so as to facilitate motor and pedestrian usage of the roadway. It accomplished that in substantial part. In fact, MacLachlan has not pled and cannot prove any defect of Pennsylvania Road itself.

Absent from the court of appeals' opinion and likewise missing from MacLachlan's response brief, is any discussion of the merits of the City's position based upon *Nawrocki*. Following the *Nawrocki* decision, the Court has issued a number of decisions refining the *Nawrocki* rule. *Hanson v Board of County Road Commissioners of the County of Mecosta*, 465 Mich 492 (2002) is one such example. This appeal presents the Court with an opportunity to apply *Nawrocki*, only this time in the context of an accumulation of snow on the side of a roadway.

MacLachlan's asserted position is that the highway exception applies "for the reason that the defendant City of Lansing's actions created a wall of snow and ice on the traveled upon roadway that prohibited the decedent from leaving the improved portion of the roadway." (Response Brief, p. 7). Neither MacLachlan in his response brief nor the court of appeals in its January 20, 2005 unpublished opinion has taken the *Nawrocki* holding properly into account. The court of appeals only cited the City's maintenance

and repair of roadways within its jurisdiction and further mentioned in passing in conjunction with its single citation of *Nawrocki*, that the highway exception is to be narrowly construed. That was the extent of the court of appeals' discussion of immunity. It was clear error for the court of appeals not to more fully consider the *Nawrocki* decision and its application to this case. Had it paid close attention to *Nawrocki*, the court of appeals would have affirmed the trial court's grant of summary disposition to the City.

MacLachan has made no claim that Pennsylvania Avenue was defective. He did not assert that the roadway was unsafe or dangerous. He pointed to no defects or dangerous conditions attributable to the alleged negligent maintenance and repair of the City's street.

MacLachlan's claim that the natural accumulation doctrine has no application here because the wall of snow constituted an "increased danger" is unfounded. In order to be considered an increased hazard, the interference with travel presented by an unnatural accumulation of snow must be unusual, exceptional, or different in character from the conditions ordinarily and generally brought about by winter weather in a given locality, *Skogman v Chippewa County Road Commission*, 221 Mich App 351, 355 (1997) and *Hampton v Master Products, Inc*, 84 Mich App 767, 770 (1978). However, a review of the photographs attached as Ex. 2 to plaintiff's response brief proves MacLachlan's inability to make such a showing. There was nothing about the City's plowing of Pennsylvania Avenue, pushing the snow to the side and off of Pennsylvania Avenue, so

as to allow for greater ease of travel by motorists and pedestrians, which introduced a new element of danger not ordinarily and generally brought about by winter weather in a given locality. MacLachlan's photographs submitted along with his response brief depict far better than the City could ever express, the clear and obvious fact that no element of danger resulted from the City's snow-plowing activities.

The City's request for leave to appeal is based in part upon the public policy consequences and ramifications which the City fears will flow from allowing the court of appeals' decision to stand. The City has repeatedly expressed a concern that imposition of liability in this instance will have the effect, amongst other things, of dissuading governmental agencies with highway jurisdiction from clearing their streets of snow and ice. It seems as if the City's fears have been realized. For, on page 11 of his response brief, MacLachlan argues as follows:

In the case at bar the danger was not lessened by the City plowing into a massive wall on the improved portion of the roadway. Had the defendant not plowed at all no defect in the roadway would have been created and the decedent would have been able to safely leave the improved and traveled upon roadway. (emphasis added)

This statement MacLachlan is demonstrative of the quandary in which the court of appeals' decision places governmental agencies with highway jurisdiction. Should they plow snow? Are they better off leaving the snow on the road? Should they still plow in the traditional way of pushing the snow off to the side of the road? Or will leaving the snow at the side of the road only invite liability?

Above all, the City of Lansing believes that the court of appeals' decision does not represent the proper strict and narrow interpretation of MCL 691.1402(1) which this Court embraced in *Nawrocki*. There, the Court set out to rid our jurisprudence of case law improperly interpreting and applying the highway exception to immunity. The City believes that the court of appeals' January 20, 2005 ruling falls in line with the cases rejected by the *Nawrocki* court. The City of Lansing, as well as other governmental agencies with highway jurisdiction, look again to this Court for guidance, this time as it regards their snow plowing responsibilities in this post-*Nawrocki* era.

RELIEF

WHEREFORE, defendant-appellant City of Lansing, respectfully requests that the Court peremptorily reverse the Court of Appeals' January 20, 2005 opinion reversing the trial court's October 1, 2003 opinion and order granting summary disposition to the City of Lansing and, failing that, grant this application for leave to appeal.

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